SUPREME COURT, U. S.

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No. 74-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

METROPOLITAN TRASH, INC., a Colorado corporation,
Petitioners,

v.

JOHN T. DUNLOP, Secretary of Labor,
United States Department of Labor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT:

The Ruling of the Tenth Circuit Court of Appeals Extended the Jurisdictional Reach of the Fair Labor Standards Act into Activities Previously Regulated by the States and Narrowed the Act's Retail Exemption Contrary to a Decision of the Fourth Circuit Court of Appeals 7

CONCLUSION 14

APPENDIX A—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ... 1a

AUTHORITIES

CASES:

Barnett vs. *A-1 Scavenger Service Co.*, 466 SW.2d 150 (1971) 10-11

Batts vs. *Professional Building, Inc.*, 276 F. Supp. 356 (S.D. W.Va. 1967) 9

10 East 40th Street Building, Inc. vs. *Callus*, 325 U.S. 578, 65 S.Ct. 1227, 89 L.Ed. 1806 (1949) 7, 8, 13

Kirschbaum Co. vs. *Walling*, 316 U.S. 517, 52 S.Ct. 1116, 86 L.Ed. 1638 (1942) 7, 8

McLeod vs. *Threlkeld*, 319 U.S. 491, 63 S.Ct. 1248, 87 L.Ed. 1538 (1943) 8

Page

Mitchell vs. *Lublin, McGaughy & Associates*, 358 U.S. 207, 79 S.Ct. 260, 3 L.Ed. 2d 243 (1959) 8

Mitchell vs. *C. W. Vollmer & Co.*, 349 U.S. 427, 75 S.Ct. 860, 99 L.Ed. 1196 (1955) 8

Mitchell vs. *H. B. Zachry Co.*, 362 U.S. 310, 80 S.Ct. 739, 4 L.Ed. 2d 753 (1960) 7, 10, 11, 15

Schultz vs. *Instant Handling, Inc.*, 418 F.2d 1019 (5th Cir. 1969) 10, 11, 13

Walling vs. *Jacksonville Paper Co.*, 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943) 7, 8

Wirtz vs. *DeBoer Bros.*, 51 CCH Lab. Cas. 31 (N.D. Ill., 1965) 10, 11

Wirtz vs. *Modern Trashmoval, Inc.*, 323 F.2d 451 (4th Cir. 1963), cert. denied, 377 U.S. 925, 84 S.Ct. 1222, 12 L.Ed. 2d 216 (1964) 8, 9, 10, 11, 15

FEDERAL STATUTES:

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.*

Section 3(j) 2, 11
Section 3(s) 14
Section 3(s)(1) 6
Section 11(c) 6
Section 13 6
Section 13(a)(2) 2, 6, 14, 15
Section 17 6

MISCELLANEOUS:

Decision of the Public Utilities Commission of the State of Colorado

Decision No. 23588, Application of Curnow Transportation Company 12

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v.

JOHN T. DUNLOP, Secretary of Labor,
United States Department of Labor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Metropolitan Trash, Inc., a Colorado corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on January 13, 1975.

OPINIONS BELOW

There was no formal opinion of the United States District Court below, but the order and judgment of the Court are contained in the record lodged with the

Clerk of the United States Court of Appeals for the Tenth Circuit. The decision of the United States Court of Appeals for the Tenth Circuit is contained in Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the ruling of the Tenth Circuit Court of Appeals extended the jurisdictional reach of the Fair Labor Standards Act into activities previously regulated by the States and narrowed the Act's retail service exemption contrary to a decision of the Fourth Circuit?

STATUTES INVOLVED

The Fair Labor Standards Act of 1938, c. 676, Stat. 1060, as amended; 29 U.S.C. 201 *et seq.;* provides in the following sections:

Section 3(j) of the Act defines "produced" as follows:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this chapter, any employee shall be deemed to have been engaged in the production of goods if such employee was *employed in producing,* manufacturing, mining, *handling,* transporting, or in any other manner working on such goods or *in a closely related process or occupation directly essential to the production thereof, in any state.*" (Emphasis added).

Section 13(a) (2) states the retail or service establishment exemption under the Act as follows:

> "(2) Any employee employed by any retail or service establishment, . . . if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services, is made within the state in which the establishment is located, and such establishment is not in an enterprise described in Section 203(s) of this title, or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level, which are separately stated). A 'retail or service establishment' shall mean any establishment 75 per centum of whose annual dollar volume of sales or goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;"

STATEMENT OF THE CASE

For purposes of clarity, the Appellant, Metropolitan Trash, Inc., will be referred to as "Metropolitan", and John T. Dunlop, Secretary of Labor, United States Department of Labor, will be referred to as "Secretary".

Metropolitan is a small, family owned and managed Colorado corporation engaged in the collection of refuse within the Denver metropolitan area, pursuant to an intrastate common carrier authority issued by the Public Utilities Commission of the State of Colorado. As a common carrier, Metropolitan must hold itself out to provide trash removal service to all members of the public, be they residential or commercial, and cannot by law, discriminate between the two types of services.

Metropolitan holds no contract carrier authority from the Public Utilities Commission which would require it to dedicate its equipment and tailor its services to meet

the specialized and unique needs of a particular commercial customer or a limited number of customers. Metropolitan holds no interstate operating authority from the Interstate Commerce Commission because the activities of its employees take place entirely within the State of Colorado.

The Defendant, at all times since January 8, 1971, has had an annual volume of sales made or business of not less than two hundred fifty thousand dollars ($250,000.00), exclusive of excise taxes at the retail level separately stated. All of Metropolitan's annual dollar volume of sales from its trash service is derived from its operations in the Denver metropolitan area. Metropolitan's trash collection and disposal service is not resold by any of its customers and is, by its very character, at the end of the stream of distribution.

Metropolitan's employees proceed in trucks to the address of its customers where they collect refuse placed in various sized containers that are selected and located by Metropolitan to permit its employees convenient access for their trucks in order to facilitate the rapid collection of refuse. Metropolitan's employees handle mostly paper, cans, bottles, etc. They do not handle special kinds of trash, such as poisonous, chemical wastes, or radioactive materials, nor provide any specialized equipment or containers to any of its customers, but merely utilizes standard trash containers and equipment in its operations.

Metropolitan's employees follow the route cards given to them each day whereby they proceed from one customer to the next, emptying the containers or loading them into the truck, and thereafter to haul the unsorted trash and garbage to an incinerator or dump for final

destruction. Metropolitan's employees are merely instructed as to how to operate Metropolitan's motor vehicle equipment. The Corporation's drivers and helpers are not concerned with the production activities of its customers. Metropolitan's employees: (1) receive no special training or instructions concerning the type of service particular customers are receiving; (2) possess no knowledge of the details of any of the customers' businesses; (3) do not coordinate their activities with those of Metropolitan's customers' employees; and (4) do not enter customers' production facilities in the performance of their duties. Metropolitan's employees are merely required to be able to operate the truck and drive the particular route assigned to them on any given day. The routes followed by the various Metropolitan drivers are interchanged from time to time for Metropolitan's convenience.

The work performed by Metropolitan's employees is separate and apart from the physical process of production of its customers. The service Metropolitan provides is held out on the same terms for the use of anyone in the geographical area served under its Public Utilities Commission common carrier authority, and is exemplified by lack of dedication to production for commerce. If Metropolitan wanted to provide a specialized service and dedicate its equipment to the special needs of a particular commercial customer or a limited number of customers, it could obtain "contract" carrier authority from the Colorado Public Utilities Commission. By definition "contract carriers" dedicate their equipment and tailor their services to meet the specialized and unique needs of a limited number of customers.

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act of 1938, as amended, (hereinafter referred to as the "Act"), (29 U.S.C. Sec. 201 *et. seq.*). The Secretary sought to enjoin Metropolitan from violating the provisions of the Act governing payment of overtime wages and for Metropolitan's alleged failure to keep records as prescribed by regulations promulgated under Section 11(c) of the Act The District Court entered judgment against Metropolitan on the grounds that its business was a covered enterprise under Section 3(s) (1) of the Act, and it was not entitled to the retail exemption under Section 13 of the Act.

On September 14, 1973, Metropolitan filed a timely Motion for New Trial challenging the trial court's Order on the grounds the Secretary had failed to establish the jurisdictional nexus under the Act because Metropolitan was not an enterprise "engaged in commerce", or "in the production of goods for commerce", nor was it involved in "a closely related process or occupation directly essential to the production of goods." Metropolitan, arguing in the alternative in its Motion, asserted if the Act applied, then it was exempt as a retail service establishment under Section 13 (a) (2) because of its employees' activities.

Upon the District Court's denial of Appellant's Motion for a New Trial, Metropolitan filed a timely appeal in the United States Court of Appeals for the Tenth Circuit. After oral argument, the United States Court of Appeals, on January 13, 1975, affirmed the Judgment of the District Court. It is to this Decision that the Appellant has filed this Petition for Writ of Certiorari, invoking this Court's jurisdiction, pursuant to 28 U.S.C. § 1254 (1).

REASON FOR GRANTING THE WRIT

The Ruling of the Tenth Circuit Court of Appeals Extended The Jurisdictional Reach of the Fair Labor Standards Act Into Activities Previously Regulated by the States and Narrowed the Act's Retail Exemption Contrary to a Decision of the Fourth Circuit Court of Appeals.

It has been consistently held that Congress, in its enactment of the Fair Labor Standards Act of 1938, and the subsequent 1949 Amendments thereto, did not exercise the full scope of its power to regulate commerce. The jurisdictional reach of the Act cannot be understood merely in terms of the social consequences of the Act, in light of which any limitation must appear inconsistent, because the Act also manifests the competing concern Congress had reflected in its intent to avoid undue displacement of state regulation of activities predominantly local in character. See *Mitchell* vs. *H. B. Zachry Co.*, 362 U. S. 310, 80 S. Ct. 739, 4 L. Ed. 2d 753 (1960) This concept underlying the jurisdictional scope of the Act was crystallized by this Court when it stated in *10 East 40th Street Building, Inc.* vs. *Callus*, 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806 (1949), at page 582:

> " . . . *Merely because an occupation is indispensable, in the sense of being included in the long chain of causation*, which brings about so complicated a result as finished goods, *does not bring it within the scope of the Fair Labor Standards Act.* (Citations omitted). In giving a fair application of Section 3 (j), courts must remember that the 'necessary' in the phrase 'necessary to production' of goods for commerce, 'is colored by the context not only of the terms of this legislation, but of its implications in the relation between state and national authority'. *Kirschbaum Co.* vs. *Walling*, supra, at 525. For as was pointed out in *Walling* vs. *Jacksonville Paper Co.*, supra, at 570, we cannot

> 'be unmindful that Congress, in enacting this statute, plainly indicated its purpose to leave local business to the protection of the states'. *We must be alert*, therefore, *not to absorb by adjudication, essentially local activities that Congress did not see fit to take over by legislation.*" (Emphasis added).

It is the activities of Metropolitan's employees, rather than those of the corporation, which are decisive on the question of the Act's coverage. The Court's decisions are governed by practical considerations rather than technical concepts. *See Wirtz* vs. *Modern Trashmoval, Inc.,* 323 F. 2d 451 (4th Cir. 1963), cert. denied, 377 U.S. 925, 84 S. Ct. 1222, 12 L. Ed. 2d 216 (1964); *Mitchell* vs. *Lubin, McGaughy & Associates,* 358 U. S. 207, 79 S. Ct. 260, 3 L. Ed. 2d 243 (1959); *Mitchell* vs. *C. W. Vollmer & Co.,* 349 U.S. 427, 75 S. Ct. 860, 99 L. Ed. 1196 (1955); *McLeod* vs. *Threlkeld,* 319 U.S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538 (1943); *Walling* vs. *Jacksonville Paper Co.,* 317 U. S. 564, 63 S.Ct. 332, 87 L. Ed. 460 (1943); *Kirschbaum Co.* vs. *Walling,* 316 U.S. 517, 52 S. Ct. 1116, 86 L. Ed. 1638 (1942).

This Court has set forth in the following cases various elements the lower Court must consider in order to avoid the assimilation by adjudication of those activities Congress had never intended to preempt by legislation. This Court, in *10 East 40th Street Building, Inc.* vs. *Callus,* supra, at page 483, stated:

> "Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But *remoteness* of a particular occupation from the physical process is a relevant factor in drawing the line. *Running an office building as an entirely independent enterprise is too many steps removed*

from the physical process of the production of goods. Such *remoteness* is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress *not* to sweep predominantly local situations within the confines of the Act." (Emphasis added).

In *Wirtz* vs. *Modern Transmoval, Inc.*, supra, involving another refuse collection company, the Court of Appeals for the Fourth Circuit, discussed the guidelines to be used in the application of the Act, at page 460:

> "So far as can be determined, the holdings in *Kirschbaum, Borden Co.*, and *Callus* reflect existing law based on their respective fact situations. Moreover, in applying the Act to those employed in activities merely 'related' to production for commerce, *a conservative view has persisted, and requires independent consideration of each situation to determine the character of the relationship between the employees' activity, and interstate commerce.* Thus, merely listing occupations as covered or exempt under the Act can provide little guidance. Porters, for instance, can fall on either side of the line.
>
> Careful examination of the cases convinces us that *two factors, among others*, which are vital in holding an employee's employment within the coverage of the Act, are the degree of *'remoteness'* of his activity from production for commerce, and the presence or absence of a *'dedication' to production for commerce.* In short, for coverage to extend to an employee, his activity cannot be too remote from production for commerce, and it cannot completely lack dedication to production for commerce." (Emphasis added).

The Fourth Circuit Court of Appeals analysis of the factors determining application of the Act was quoted with approval in *Batts* vs. *Professional Building, Inc.*, 276 F. Supp. 356 (S.D. W. Va. 1967).

The United States Supreme Court, in *Mitchell* vs. *H. B. Zachry, Co.*, supra, found on the basis of *remoteness* of the construction of the dam from production *and* the *absence of a dedication* of the completed facilities, *either exclusively or primarily, to production*, the employees involved in the construction fell outside the jurisdictional scope of the Act.

The courts have also considered whether the employees were alert, well trained and attentive to each customer's unique needs, as a test to determine the jurisdictional scope of the Act. See *Wirtz* v. *DeBoer Bros.*, 51 CCH Lab. Cas. 31 (N. D. Ill, 1965); and *Wirtz* vs. *Modern Trashmoval, Inc.*, supra. The Fourth Circuit Court of Appeals in *Wirtz* vs. *Modern Trashmoval, Inc.*, supra, at page 461 stated:

> "The character and activity of the customers are so immaterial to Modern's operations that Modern's *employees are generally uninformed and unconcerned about the customers they serve.* The sole problem confronting the drivers is how to remove the trash with dispatch and how frequently to return for more. If any of Modern's customers produces goods for shipment in interstate commerce, the relationship of the employee serving that customer to such production for commerce is purely *fortuitous* and is subject to change. . ." (Emphasis added).

Another element the courts have taken into account in determining the jurisdictional scope of the Act, is whether the employees have a continuous or almost continuous presence at the customer's location to assure the required level of service, as opposed to brief visits by employees who collect trash and then leave. See *Schultz* vs. *Instant Handling, Inc.*, supra; *Wirtz* vs. *DeBoer Bros., Inc.*, supra; *Barnett* vs. *A-1 Scavenger*

Service Co., 466 S.W. 2d 150 (1971); and *Wirtz* vs. *Modern Transmoval, Inc.*, supra.

The courts have also considered the close similarity between the work of the employees in question and the work of the customers' janitorial staff in determining the application of the Act. See *Schultz* vs. *Instant Handling, Inc.*, supra, and *Wirtz* vs. *DeBoer Bros., Inc.*, supra.

Lastly, the courts have also weighed whether the customers' trash container is close enough to production equipment to have a significant effect upon it. See *Schultz* vs. *Instant Handling, Inc.*, supra; *Barnett* vs. *A-1 Scavenger Service Co.*, supra; and *Wirtz* vs. *Modern Trashmoval, Inc.*, supra.

Mr. Justice Frankfurter, in delivering the opinion of the Supreme Court in *Mitchell* vs. *H. B. Zachry,* supra, stated Congress clearly had intended to narrow the scope of coverage under the Act by the 1949 amendment to the statutory definition of "produced" in Section 3(j), when he noted on page 312 of that decision, the 1949 amendment changed the language of Section 3(j) from "... in any process or occupation necessary to the production thereof..." to "... or in any closely related process or occupation directly essential to the production thereof..." Even in the most recent amendments to the Act, the terms "closely related" and "directly essential" were not deleted, again clearly manifesting Congress' intent to restrict its jurisdictional reach and leave activities predominantly local in character, such as Metropolitan's to the regulation of the States.

The *two* threshold tests the Secretary must pass before the jurisdictional nexus of the Act attaches to Metropolitan is that its employees are both "closely

related" and "directly essential" to the production of goods for commerce.

The cases previously cited define "closely related" in terms of: (1) the remoteness of Metropolitan's employees from the physical process of production; (2) whether Metropolitan's employees are alerted, trained or attentive to each customer's unique needs; (3) do Metropolitan's employees have a continuous or almost continuous presence at the customer's location; (4) whether Metropolitan's employees work in close cooperation with the customer's employees in an integrated work operation; (5) is there a close similarity between the work performed by Metropolitan's employees and the work of the customer's janitorial staff; and (6) are the trash containers close enough to production equipment to have a significant effect upon it.

The second test the Secretary must pass to bring Metropolitan within the jurisdictional scope of the Act is whether or not the activities of its employees are "directly essential" to the production of goods for commerce. In the authority previously cited, the criteria used in defining this term is whether Metropolitan's employees are dedicating either exclusively or primarily to production of goods for commerce. If Metropolitan were a contract carrier, its employees would be alerted, trained or attentive to the specialized service designed and tailored to meet the needs of a particular commercial customer or a limited number of customers. See the application of *Carnow Transportation Company,* Application No. 23588, a Decision of The Public Utilities Commission, which The District Court took judicial notice of, and is part of the record lodged with the Clerk in The United States Court of Appeals for The Tenth Circuit. It is this Decision of the Colorado Public Utilities Commission,

which sets forth the characteristics of a common carrier, such as Metropolitan in that: (1) it dedicates its equipment to the public use, and (2) must serve the public indiscriminately. Metropolitan's employees are unlike the employees in *Schultz* v. *Instant Handling, Inc.*, supra, who historically follow the characteristics of contract carriers when they were required to keep a truck under the customer's hopper at all times because there was a constant flow of sludge.

Not a single witness testified that trash removal was a closely related process or occupation, directly essential to the production of goods for commerce. In fact, four of the government's witnesses affirmatively testified that trash removal service was *not* a closely related process or occupation, directly essential to their various companies' production. It appears from the lower court's rulings the foundation for its decision is based upon the fact that the business of the six (6) Metropolitan customers who testified, was connected with interstate commerce, and it was *quite likely* these businesses would eventually have cessation of production of goods without trash removal services. The lower courts appear to be overly concerned with the interstate commerce aspect of Metropolitan's customers contrary to its responsibility to consider the activities of Metropolitan's employees as determinative of the Act's coverage. As previously noted, in the *10th East 40th Street Building, Inc.* v. *Callus, supra,* this is not the criteria within which to define the Act's jurisdiction.

Petitioner respectfully submits the Secretary has failed to prove the litmus tests of "closely related" and "directly essential" within the frame of reference established by the existing case law cited, supra.

Assuming, for purposes of argument, the Act applied, the Decision of the lower Courts, contrary to the Fourth Circuit, through its restrictive interpretation, has deprived Metropolitan of the retail service establishment exemption under Section 13(a)(2) of the Act. The District Court specifically found Metropolitan was a "retail service" establishment, and it is, we submit, exempt from the jurisdiction of the Act as a matter of law. Metropolitan, by the Character of its activities, can't be an "enterprise" as described in Section 3(s) of the Act. All of Metropolitan's annual dollar volume of sales is derived from its refuse collection service in the metropolitan Denver area. Metropolitan is not engaged in the sale of goods and services for resale due to the "common carrier" nature of Metropolitan's operation. It is eligible for the retail service exemption because its operations have a "retail concept".

CONCLUSION

The record establishes that (1) Metropolitan's employees are not alerted, trained or attentive to any of its customers' unique needs, (2) Metropolitan's employees do not have a continuous or almost continuous presence at the customer's location, (3) Metropolitan's employees do not work in close cooperation with the customer's employees in an integrated work operation, (4) there is no close similarity between the work performed by Metropolitan's employees and the work of the customer's janitorial staff, and (5) the trash containers are not close enough to production equipment to have a significant effect upon it. The activities of Metropolitan's employees are too remote from the physical process of production to be covered by the Act.

Assuming, for purposes of argument, the activities of Metropolitan's employees were subject to the Act's jurisdiction, Metropolitan's service by its very character, is at the "end of the stream of distribution" and it is entitled to the retail exemption under Section 13(a)(2) of the Act.

The Petitioner respectfully submits the Courts below, by failing to adopt the construction of the Fourth Circuit Court of Appeals in *Wirtz* v. *Modern Trashmoval, Inc.*, supra, and this Court in *Mitchell* v. *H. B. Zachry Co.*, supra, have extended by adjudication, the jurisdictional reach of the Fair Labor Standards Act into those activities predominantly local in nature, which Congress intended the states to regulate and restricted the application of the retail service exemption.

For the reasons set forth above, the Petitioner respectfully requests this Honorable Court, by Writ of Certiorari, to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1200

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellee,

v.

METROPOLITAN TRASH, INC., a corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Colorado

(D.C. No. C-4657)

Donald S. Shire and Melanie Franco Nussdorf, Attorneys, United States Department of Labor (William J. Kilberg, Solicitor of Labor, Carin Ann Clauss, Associate Solicitor and Tedrick A. Housh, Regional Solicitor, United States Department of Labor, on the brief), for Plaintiff-Appellee.

Robert G. Shepherd, Jr., Denver, Colorado (William Andrew Wilson, P.C., Denver, Colorado, on the brief), for Defendant-Appellant.

Before SETH, BARRETT and DOYLE, *Circuit Judges.*

DOYLE, *Circuit Judge.*

Metropolitan, the appellant, was adjudged by the district court to be liable under the Fair Labor Standards Act.[1] Damages were not in issue. It was stipulated that the back wages amounted to $10,485 covering the period from January 8, 1971 through August 27, 1973, and that thereafter the sum of $79.44 accrued each week. The sole issue on

[1] 29 U.S.C. § 201 et seq.

this appeal is whether Metropolitan's activities are covered by the Act. To be more specific, the issue is whether Metropolitan is an enterprise which had employees engaged in commerce or in the production of goods for commerce.[2]

The action arises under Section 207(a)(1) of the subject Act which prohibits a workweek longer than 40 hours unless the employee is paid time and one-half for the hours in excess of 40 hours.

Basically, Metropolitan is a local corporation which collects trash from the premises of its customers and disposes of it. Its president testified that more than one-half of the trash hauled by it is collected from commercial customers

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[2] Section 203(s) provides:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which . . . is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated).

Section 203(b) defines

> "Commerce" as trade, commerce, transportation, transmission or communication among the several States or between any State and any place outside thereof.

Section 203(i):

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

The definition of "enterprise" contained in § 203(s) is also relevant:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose.

and that at least 95% of its income is derived from commercial customers. There was testimony of six of Metropolitan's customers at the trial who said that they were engaged in the production of goods for commerce. The trial court so found and concluded. We affirm.

Manufacturers which were shown to have been served by Metropolitan included the following:

(1) Benjamin Moore Co.—paint manufacturer.

(2) Colorado Tanning & Fur Co.—custom tanning company.

(3) ITT, Continental Baking Co.—Baking company.

(4) Cutler Hammer Co.—manufacturer of equipment for the newspaper industry.

(5) Packaging Corporation of America——manufacturer of paperboard.

(6) Skyline Corp.—manufacturer of mobile homes.

Metropolitan has authority from the Colorado Public Utilities Commission to provide trash removal service. It is required to provide the service to all members of the public who desire its services (for a price, of course).

Ordinary refuse is hauled and disposed of by Metropolitan. This consists of paper, metal, bottles, pieces of metal, etc. Several types of containers are furnished by Metropolitan according to the particular needs of the customer. These containers remain the property of Metropolitan but are in the possession of the customer.

A further factual stipulation was that at least 80% of Metropolitan's equipment and repair items are manufactured in states other than Colorado.

The work performed by Metropolitan's employees is to a large degree ordinary labor. No special training is given

and the containers are placed in a manner which serves the convenience of the Metropolitan employees so that they are seldom required to enter the customers' premises. The services are performed within the confines of Denver.

The trial court found that "two or three employees of defendant's regularly engage in removal of trash or rubbish on a basis intimately related to the production of goods for commerce" and thereby their activities are directly related to the goods for commerce in that their efforts are essential to such production.[3]

It is apparent that the dispute presented is a legal one as to whether Metropolitan's services are closely related and directly essential to the production of goods for commerce.

It is to be recognized at the outset that the Fair Labor Standards Act does not utilize fully the powers granted by the commerce clause of the Constitution. Mitchell v. H. B. Zachry Co., 362 U.S. 310 (1960); Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207 (1959); McLeod v. Threlkeld, 319 U.S. 491 (1943); Kirschbaum C. v. Walling, 316 U.S. 517 (1942). Thus, § 203(j) provides in part that "an

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[3] The trial court elaborated as follows:

> The Court finds the close connection between the manufacturing and distribution process of the six corporations and its clear dependence on rubbish disposal in this case. The Court further finds that the removal of trash from a facilty used for the production of goods for commerce which facilities are defendant's customers is essential and necessary for the reasons being that there is a serious sanitation question and should the trash not be removed, it is rather apparent as to the sanitary conditions from all of the six businesses, especially the tanning company. Further that the failure to remove trash impairs the operation and it is questionable whether the six companies which the Court finds are rather representative of defendant's customers could operate to any degree of efficiency without rubbish and trash removal; that is quite likely that these businesses could not operate and would have cessation of the production of goods for commerce at said facilities.

employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof, in any State.*" We are, of course, concerned with the latter two clauses and, particularly, the final one in § 203(j) which says "or in any closely related process or occupation directly essential to the production thereof." It is agreed by Metropolitan that its employees regularly remove trash from the manufacturing facilities which are used for producing goods for commerce, and it is also conceded by Metropolitan that this activity is related and essential to their operation, so actually the only question here is whether their services are closely related to and directly essential to the production. In our opinion their activities meet the standard.

In Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 429 (1955), the Supreme Court set forth in its opinion a test as to whether the activity was closely related and directly esential. The Court said at page 429:

> The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity.

It is noteworthy that the corporate officers of the customer companies which have been listed above testified to the essential relationship of the trash hauling effort to the manufacturing process, and indeed it is impossible to conclude that the refuse disposal is something separate from the manufacturing process. It is not unlike a cleaning and maintenance service and this has been held to be vitally related to the production process. *See* Borden Co. v. Borella, 325 U.S. 679 (1945); Kirschbaum Co. v. Walling, 316 U.S. 517 (1942); Nunn's Battery and Electric Co. v. Wirtz, 335 F.2d 599 (5th Cir. 1965); Mitchell v. Mercer Water

Co., 208 F.2d 900 (3d Cir. 1953). It is arguable that the trash hauling of waste removal is even more closely a part of the manufacturing process than cleaning the premises, for example.

Most of the cases which deal with this question have held that there was coverage. Schultz v. Instant Handling, Inc., 418 F.2d 1019 (5th Cir. 1969); Mitchell v. Dooley Bros., Inc., 286 F.2d 40 (1st Cir. 1960), cert. denied, 366 U.S. 911 (1961); Hodgson v. Elmer's Disposal Service, Inc., 68 CCH Lab. Cas. ¶ 32,706 (S.D. Cal. 1972); Hodgson v. Superior Sanitation, Inc., No. C-3430, D. Colo., decided May 30, 1972; Wirtz v. DeBoer Bros., Inc., 51 CCH Lab. Cas. ¶ 31,695 (W.D. Ill. 1965). *Cf.* Bledsoe v. Wirtz, 384 F.2d 767 (10th Cir. 1967), wherein defendant's employees received, sorted, fed and cared for cattle which belonged to others, but which were sold at defendant's auction. *See also Crook* v. *Bryant,* 265 F.2d 541 (4th Cir. 1959), wherein the employees operated a wrecker service which removed vehicles from roads which connected with interstate highways. Wirtz v. English, 245 F. Supp. 628 (D. Kan. 1965) involved the hauling of salt water and sediment from customers' oil leases.

In *Dooley* defendant removed garbage and ashes from businesses engaged in the production of goods for commerce. It was found that the defendant was covered.

Instant Handling was a waste disposal system used by industrial concerns.

Elmer's Disposal Service was engaged in the collection and recycling of solid waste. It was held that the company was an enterprise which engaged in commerce.

Superior Sanitation was a trash and rubbish hauling case in which it was ruled that there was coverage.

DeBoer Bros. was a trash hauling case and was ruled to be within the Act.

Metropolitan relies on the decisions of Wirtz v. Modern Trashmoval, Inc., 323 F.2d 451 (4th Cir. 1963) and Barnett v. A-1 Scavenger Service Co., 466 S.W.2d 150 (Mis. App. 1971). The Fourth Circuit reasoned that the connection of the trash disposal activity was indirect and, therefore, remote from the manufacturing process. The court relied on Mitchell v. H. B. Zachry, *supra,* in which the activity was factually remote from the production of goods for commerce.

The opinion in *Modern Trashmoval* stressed the necessity for substantial dedication to customers engaged in commerce. In that case it was estimated that only 10-15% of the defendant's customers were so engaged and it is thus distinguishable on its facts.

In our case there is a substantial part of Metropolitan's efforts which are devoted to manufacturers engaged in the production of goods for commerce. It is on this basis that we hold that in the case at bar the trial court was correct in finding that Metropolitan's services were closely related and directly essential to the production of goods for commerce. Metropolitan's efforts were shown by the evidence to have been an essential aspect of the manufacturing process in connection with the six large manufacturing firms whose officers testified at the trial.

In view of our determination that Metropolitan's services are an essential part of the production of goods for commerce, it is unnecessary to take up the alternative grounds for upholding the judgment, namely, whether Metropolitan was shown to have been engaged in handling goods that have been moved in commerce.

We do not feel that it is essential to take up Metropolitan's further contention that it falls within the retail establishment exemption to the Act, § 13(a), 19 U.S.C. § 213(a)(2). The vast preponderance of Metropolitan's customers were shown to have been commercial entities. At least 95%

of Metropolitan's customers were shown to have been firms engaged in commerce or manufacturing activities. No effort is made by Metropolitan to establish that services were furnished at the uniform rates and without wholesale type discounts. Thus, Metropolitan was not shown to have been a house to house collector but, rather, was engaged at the commercial level on a volume basis, and so we conclude that the trial court correctly found that Metropolitan failed to establish its status as a retail establishment entitled to the exemption.

The Judgment is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1275

METROPOLITAN TRASH, INC., PETITIONER

v.

JOHN T. DUNLOP, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is a suit for enforcement of the overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938 (the "Act"), 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.* Petitioner, which is engaged in the trash removal business, seeks review of two rulings of the court of appeals: (1) that petitioner is an enterprise whose employees are within the Act's coverage because some of its employees perform functions that are closely related and directly essential to the production of goods for interstate commerce; and (2) that petitioner is not entitled to the special exemption for certain "retail or service establishments" in Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2). Both rulings are correct and present no conflict with decisions of other courts of appeals or of this Court.

1. Petitioner stipulated before trial that it was within the Act's definition of an "enterprise" at Section 3(r), 29 U.S.C. 203(r) (R. 13); and that its annual volume of sales has, since January 1, 1971, exceeded $250,000 exclusive of excise taxes at the retail level separately stated (Pet. 4), as specified in Section 3(s)(1), 29 U.S.C. 203(s)(1). Thus, the issue at trial was whether petitioner, as an enterprise with the requisite dollar volume of sales under Section 3(s)(1), had some employees whose activities were closely related and directly essential to production of goods for commerce, within the meaning of Section 3(j) of the Act, 29 U.S.C. 203(j), thereby bringing all of its employees within the Act's coverage. On this issue, the district court found that at least 95 percent of petitioner's income is derived from commercial customers (Pet. App. 2a-3a), including six major interstate producers whose operations would probably cease if their trash were not removed regularly (Pet. App. 4a, n. 3). For this reason—and wholly apart from the fact that petitioner's employees admittedly handled, on a regular basis, a large quantity of goods which had been shipped in interstate commerce[1]—the district court held that petitioner was a covered enterprise and that its employees were subject to the Act's overtime and recordkeeping provisions.

This holding is directly supported by *Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d 40 (C.A. 1), certiorari denied, 366 U.S. 911, and *Schultz* v. *Instant Handling, Inc.*, 418 F. 2d 1019 (C.A. 5). In each of those cases, as here, employees who removed refuse and industrial waste from facilities used by others in the production of goods for commerce were held to be covered by the Act on the ground that the employees were engaged in work which was closely related and directly essential to such production. As the

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[1]Petitioner stipulated that at least 80 percent of its equipment and repair items are manufactured out-of-state (Pet. App. 3a).

Fifth Circuit noted in *Instant Handling, supra,* the removal of trash was "essential to the continued operation" of two of the defendant's main customers (418 F. 2d at 1022). See also *Wirtz* v. *English,* 245 F. Supp. 628 (D. Kan.); *Hodgson* v. *Elmer's Disposal Service, Inc.,* 68 CCH Lab. Cas. par. 32,706 (S.D. Cal., not otherwise reported), affirmed on other grounds, 510 F. 2d 84 (C.A. 9).[2]

Petitioner's reliance on *Wirtz* v. *Modern Trashmoval, Inc.,* 323 F. 2d 451 (C.A. 4), certiorari denied, 377 U.S. 925, is unpersuasive. In that case, only 10 to 15 percent of the company's customers were engaged in the production of goods for commerce. 323 F.2d at 454. Furthermore, the company's employees had "contact for no more than a few minutes each week" with interstate producers. *Id.* at 462. Here, in contrast, the evidence showed that some of petitioner's employees spent a substantial portion of their time servicing commercial and industrial customers (Pet. App. 4a). Representatives of the six major interstate producers having contracts with petitioner testified that petitioner's employees removed trash from their production facilities three to six times a week and that they spent from 30 minutes to an hour and a half each time (*e.g.,* Tr. 8-9, 14, 19, 28, 37, 43). The

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[2]In addition to relying on the cases cited in the text, the court of appeals analogized petitioner's trash removal services to cleaning and maintenance services which have been held to be closely related and directly essential to the production of goods for commerce within the meaning of Section 3(j). See, *e.g., Borden Co.* v. *Borella,* 325 U.S. 679; *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Nunn's Battery and Electric Co.* v. *Wirtz,* 335 F. 2d 599 (C.A. 5); *Mitchell* v. *Mercer Water Co.,* 208 F. 2d 900 (C.A. 3).

evidence also established that petitioner used specialized equipment—known as "roll-off" boxes or containers with a capacity up to 43 cubic yards—to remove the trash of these interstate producers (Tr. 8).[3]

2. The court of appeals also correctly denied petitioner's claim to the exemption provided in Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2), for certain retail and service establishments. Petitioner did not raise this issue prior to moving for a new trial (Pet. 6). As a result, the record contains no evidence to prove that any of the percentage tests prescribed by that exemption have been met. These tests, as this Court has repeatedly emphasized, are not merely "suggested guidelines for judicial determination" but rather are "explicit prerequisites to exemption"; it is, moreover, the employer's burden to prove "plainly and unmistakably" that each test has been met. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. See *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 206, 209, rehearing denied 383 U.S. 963; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295; *Phillips Co.* v. *Walling*, 324 U.S. 490, 493.

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[3]The instant case is also distinguishable from *Wirtz* v. *Modern Trashmoval*, *supra*, because petitioner's employees regularly handle goods which have moved in interstate commerce and petitioner's annual dollar volume of sales is in excess of $250,000. *Modern Trashmoval* dealt with a period prior to the addition of Section 3(s) to the Act, extending coverage to "enterprises" having employees "handling" such goods (Fair Labor Standards Amendments of 1961, 75 Stat. 66). The court of appeals noted in this regard that 80 percent of the goods used by petitioner's employees in the performance of their work (such as trucks, the special roll-off boxes or containers, repair items, fuel and lubricants) had been moved in or produced for commerce (see Pet. App. 3a). Similar facts were found sufficient to establish coverage in *Brennan* v. *Dillion*, 483 F.2d 1334 (C.A. 10), and *Brennan* v. *State of Iowa*, 494 F. 2d 100 (C.A. 8), petition for writ of certiorari pending, No. 73-1565, filed April 19, 1974. In *Dillion*, employees of an apartment complex were held to be covered

Also fatal to petitioner's belated claim to the Section 13(a)(2) exemption is the stipulated fact that during the period in question petitioner had an annual gross volume of sales of not less than $250,000 exclusive of excise taxes. The exemption contained in Section 13(a)(2) is expressly limited to an "establishment [which] has an annual dollar volume of sales which is *less than* $250,000 (exclusive of excise taxes at the retail level which are separately stated)" (emphasis added). Moreover, the exemption is limited to an "establishment [which] is not in an enterprise described in section 3(s) * * *," and petitioner's business is such an enterprise.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

SYLVIA ELLISON,
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Department of Labor.

JUNE 1975.

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by reason of their regular handling of soap, paint, light bulbs and other supplies which had been moved in commerce. In *Iowa*, hospital employees were deemed covered because they regularly handled linens and medical and cleaning supplies which had been produced outside the state. For express congressional approval of the *Dillion* case and its progeny, see S. Rep. No. 93-690, 93d Cong., 2d Sess. 17 (1974).